

STATE OF MICHIGAN
COURT OF APPEALS

CHARLES W. KURZER,

Plaintiff-Appellee,

v

OAKLAND COUNTY ROAD COMMISSION,

Defendant-Appellant.

UNPUBLISHED

February 8, 2011

No. 295412

Oakland Circuit Court

LC No. 2008-093091-NO

Before: TALBOT, P.J., and SAWYER and M. J. KELLY, JJ.

PER CURIAM.

The Oakland County Road Commission (“Road Commission”) appeals the denial of its motion seeking summary disposition of Charles W. Kurzer’s claims of injury following an accident on his motorcycle based on the insufficiency of notice and the inapplicability of the highway exception to governmental immunity. We reverse.

Kurzer initiated this action in July 2008, alleging that a defective condition on Opdyke Road in Auburn Hills caused him to lose control of his motorcycle. According to a notice of injury sent by Kurzer’s counsel to the Oakland County Clerk, “[t]he accident occurred as a result . . . of numerous large potholes within the traveled portion of the highway[.]” The Road Commission sought summary disposition in accordance with MCR 2.116(C)(7) and (C)(10) based on Kurzer’s failure to initially serve the proper governmental entity, with notice not coming to its attention until after the statutory notice period had expired. The Road Commission also argued that Kurzer failed to demonstrate that it had notice of the allegedly defective condition and that Kurzer did not provide sufficient evidentiary support for his allegation that the roadway at issue was not reasonably safe for public travel. The trial court denied the motion without elaboration.

This Court reviews a trial court’s decision on a motion for summary disposition de novo.¹ A motion for summary disposition based on governmental immunity is decided by examining all documentary evidence submitted by the parties, accepting all well-pleaded allegations as true,

¹ *Ardt v Titan Ins Co*, 233 Mich App 685, 688; 593 NW2d 215 (1999).

and construing all the evidence and pleadings in the light most favorable to the nonmoving party.²

Governmental agencies in Michigan are generally immune from tort liability for actions taken in furtherance of governmental functions.³ But there are statutory exceptions to governmental immunity for public highways that require “each governmental agency having jurisdiction over a highway shall maintain the highway in reasonable repair so that it is reasonably safe and convenient for public travel.”⁴ Liability under the highway exception does not attach

unless the governmental agency knew, or in the exercise of reasonable diligence should have known, of the existence of the defect and had a reasonable time to repair the defect before the injury took place. Knowledge of the defect and time to repair the same shall be conclusively presumed when the defect existed so as to be readily apparent to an ordinarily observant person for a period of 30 days or longer before the injury took place.⁵

“Statutory exceptions to the immunity of governmental agencies are to be narrowly construed.”⁶ “[A]n *imperfection* in the roadway will only rise to the level of a compensable ‘defect’ when that imperfection is one which renders the highway not ‘reasonably safe and convenient for public travel,’ and the government agency is on notice of that fact.”⁷ Merely because a road is bumpy and has required frequent patching does not necessarily indicate that the road is not reasonably safe for travel.⁸ The same is true for rough roads that require more attentive or careful driving.⁹

Kurzer testified at his deposition that he was on his motorcycle when the front tire jerked downward, causing him to lose his grip on the handlebars and fall. Kurzer believed it was a pothole that precipitated the accident, but he never saw the condition that caused that mishap. While Kurzer never returned to the accident scene to try to identify the condition, he did send his son to the area to take photographs. Despite the bumpy condition of the roadway, Kurzer stated that he was able to maintain control of his motorcycle until a pothole caused him to lose control of the motorcycle.

² *Tarlea v Crabtree*, 263 Mich App 80, 87; 687 NW2d 333 (2004).

³ MCL 691.1407(1).

⁴ MCL 691.1402(1).

⁵ MCL 691.1403.

⁶ *Wilson v Alpena Co Rd Comm*, 474 Mich 161, 166; 713 NW2d 717 (2006).

⁷ *Id.* at 168 (emphasis in the original), quoting MCL 691.1402(1).

⁸ *Id.* at 169.

⁹ *Id.* at 169-170.

Kurzer provided his son's photographs, which show a stretch of obviously rough road. He asserts that the photographs "collectively . . . demonstrate the exact area of the defect which caused [him] to lose control of his motorcycle." Some of the photographs seem to suggest a precise location where the ostensibly compensable defect lay, but Kurzer neither asserts that any of the images depict the specific defect, nor does he explain how his son, who was not present when the accident occurred, could have identified the exact location. Our examination of the photographs fails to reveal any part of the roadway that is so defective to make it not reasonably safe and convenient for public travel. The only independent eyewitness to the accident testified that he was an experienced motorcyclist and opined that he could have ridden through the area where Kurzer fell "without a problem."

Based on this evidence, the trial court erred in concluding that there was a genuine issue of fact concerning the existence of a condition that made the subject roadway not reasonably safe and convenient for public travel.

Even if the proffered photographs and innuendoes sufficiently identified an actionable road defect, Kurzer has not come forward with anything other than pure speculation and conjecture to assert that the Road Commission had actual or constructive notice of the alleged defect. Kurzer testified that he routinely traveled that stretch of roadway, but had never noticed any specific defect he could connect with his accident. There is evidence that the road was in poor condition over a period of time, making for a generally bumpy ride. But notice of a general bumpy condition is not the equivalent of notice of a specific pothole of such dimensions that would render the roadway unsafe or inconvenient for public travel.

For these reasons, we reverse the trial court's denial of summary disposition and remand this case for entry of an order granting dismissal of Kurzer's claims. Because we decide this case based on Kurzer's failure to sufficiently specify an actionable road defect or demonstrate that the Road Commission had actual or constructive notice of such alleged defect as required, we need not reach the question of whether Kurzer served his notice of injury and highway defect on the proper party.

Reversed.

/s/ Michael J. Talbot

/s/ David H. Sawyer